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MAR 28 1951
CHARLES ELMORE CROPLEY
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No. 481.

In the Supreme Court of the United States

October Term, 1950.

MACARTHUR MINING COMPANY, INC., a Corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, *Respondent.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MOTION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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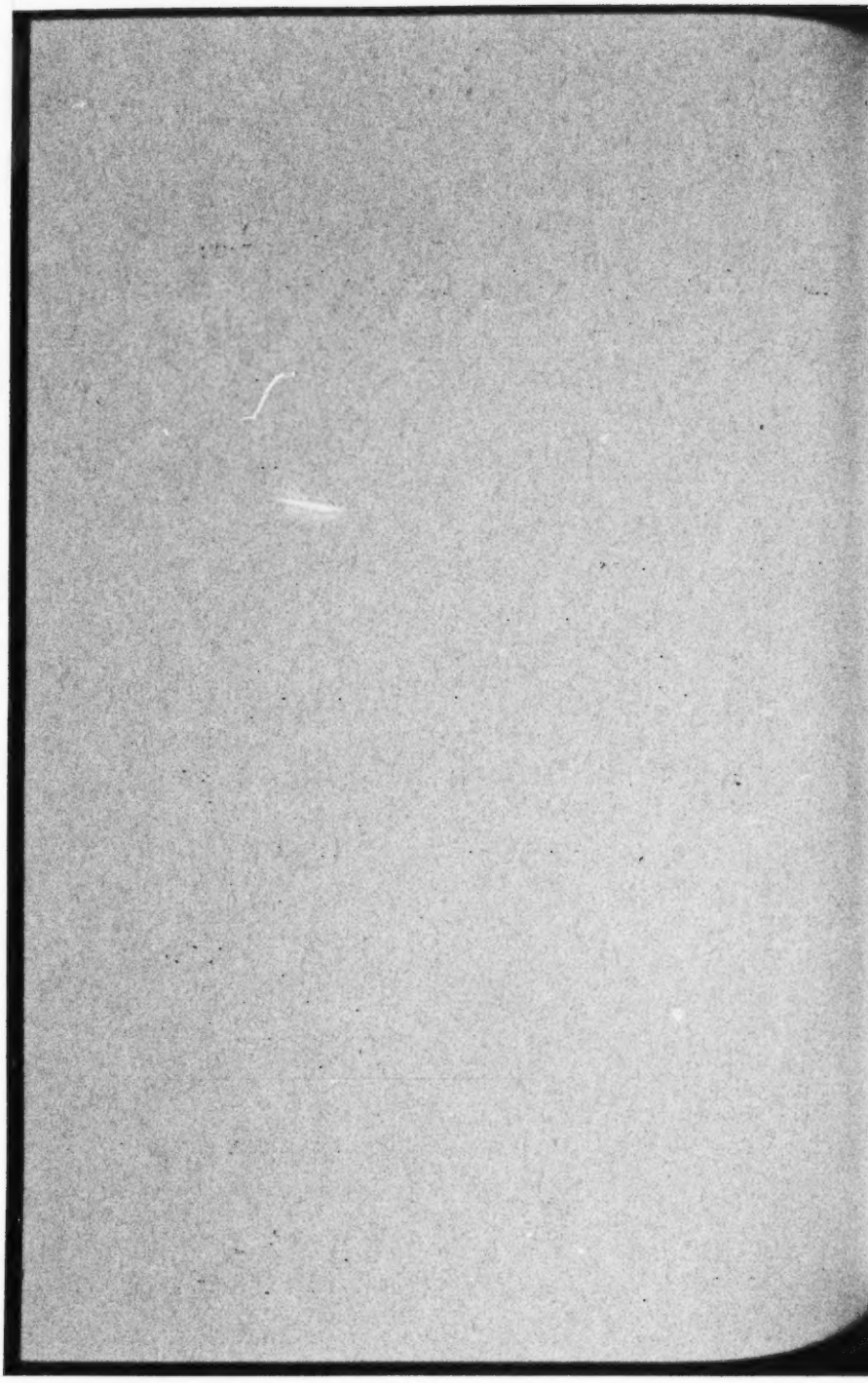

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In the Supreme Court of the United States

October Term, 1950.

MacArthur Mining Company, Inc., a Corporation,
Petitioner,

vs.

Reconstruction Finance Corporation, *Respondent.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

No. 481.

MOTION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner respectfully prays that this Court grant rehearing of its order of the 5th day of March, 1951, denying the Petition for Writ of Certiorari filed herein on the 3rd day of January, 1951, and that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case as prayed for in said Petition, filed on the 3rd day of January, 1951. By order of Court, Petitioner was granted leave to file this motion on or before March 29, 1951.

Reasons for Granting Rehearing and Issuing the Writ.

In filing this Petition counsel for Petitioner are fully cognizant of their responsibility not to file a Petition for rehearing which is in essence a "rehash" of the original Petition. We also recognize that the issuance of the writ is entirely discretionary with this Court. And also that while an erroneous decision is not, of itself, ground for certiorari, conflict of decision is ground.

However, in a case containing as many matters of public importance as are present in the case at bar, we feel that it is our duty to file this Petition to the end that these matters may not be left without authoritative decision.

Amended Rule 33 of this Court respecting rehearing provides:

> "Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantive or controlling effect, or to other substantial grounds available to petitioner although not previously presented."

First Intervening Circumstance.

A most serious and important "intervening circumstance" has occurred since the filing of the Petition for Certiorari herein which reveals still another conflict, most glaring, between Circuits upon a most important phase of this case, to wit, the construction, force, and effect of the Roosevelt Directive.

In the recent case of *Mitchell* v. *Flintkote Co.*, 2 Cir., 185 F. (2d) 1008, published February 19, 1951, the court held that a contract was illegal because in violation of an executive order of the President issued during World War II under congressionally granted war powers. (The

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same war powers authorized the Roosevelt Directive which is the basis for Petitioner's claim against the Respondent.)

This decision is in irreconcilable conflict with the decision of the Eighth Circuit in the instant case.

In the MacArthur Case, Judge Thomas held (R. 498) that the Executive Order amounted to no more than a statement of policy and therefore could not support a contract. Judge Swan, however, in the Mitchell case *supra,* held that while an Executive Order stated a federal rule of public policy, it nevertheless governed in the construction of the contract in question since it had the same force and effect of a statute.

In our case, the Executive Order *was* the contract and its requirements were certainly not complied with by the responsible agency (Respondent) or we would not be here.

The Mitchell decision sustains our position (pages 18 and 19 of the Petition) that the Executive Order has the effect of a statute and became the law of the land upon which your petitioner had a right to rely and which Respondent was legally bound to carry out. *Givens* v. *Zerbst,* 255 U. S. 11, 18.

Second Intervening Circumstance.

There is, therefore, presented by our Petition for Certiorari another conflict between the Circuits affecting matters of deep public interest and which in and of itself would appear to warrant this Court exercising its discretion and ordering the issuance of its Writ of Certiorari. There is another intervening and compelling circumstance which has occurred since the filing of our Petition.

Your Rule 38, respecting Certiorari, provides: "The Petition (Certiorari) shall contain a summary and short statement of the matter involved * * *." And Rule 27-4 provides "* * * such brief (that of Respondent) to be of

like character with that required of the other party * * * and no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side." With Rule 38 petitioner meticulously complied, setting forth only a summary and short statement of the matters involved. In fact, it was a remarkably short and exact summary to still comprehend the six questions (MacArthur Petition, pages 2, 3) presented. The Respondent did not deem it necessary to correct any inaccuracy or omission in the MacArthur statement of the matter involved which was sufficient for the purposes of the office of certiorari. But instead the Respondent, in violation of Rules 38 and 27-4, submittted a brief containing not "a summary and short statement of the matter involved" but a brief on the merits covering the whole case, presenting therein facts and alleged facts from Respondent's point of view and absolutely and apparently purposely ignoring Petitioner's side of the case. The action and conduct of the Respondent in ignoring the rules of this Court and presenting much of the facts of the case in a one-sided manner could not from counsel of intelligence and training be done other than designedly. And that design most patently was not to present to this Court a summary and short statement of the matter involved or to correct any inaccuracy or omission in the MacArthur statement, but on the other hand to prejudice MacArthur's Petition for Certiorari by a one sided and almost complete argument from respondent's point of view alone.

We, of MacArthur counsel, considered seriously requesting the Court to strike Respondent's brief from the files for violation of this Court's rules. We feel that this breach of the rules should concern the very serious attention and consideration of this Court.

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The importance of the matters involved would, in our opinion, have warranted the Respondent in joining us in request for certiorari or at least to have joined us in pointing out to this Court the unusual number and character of the points involved.

We feel that we have been badly treated and imposed upon by Respondent and only by quashing its order denying certiorari and granting certiorari in this case can justice and due process be attained.

The due process reason for granting this motion has occurred within the limitation required by the first part of your amended Rule 33 respecting rehearing above referred to. The "intervening circumstance" is the unfair nature and character of Respondent's brief violative of your rules, *supra,* which coupled with our inability properly to answer same and keep within your rules is violative of the Fifth Amendment to the United States in that it, in effect, is taking MacArthur's property without due process of law.

This Court held in *Holden* v. *Hardy,* 169 U. S. 366, that due process of law implies a conformity with the natural and inherent principles of justice. The rules of this Court are designed to effectuate those principles. Respondent's brief, however, has been constructed along other designs and it is only by this Court's granting a full hearing that this breach of its rules can be corrected.

"Fair play" inherent in due process alone would seem to warrant the granting of this motion. In the case of *People* v. *Tilkin,* 90 P. (2d) 148, the court said:

> " 'Due process' is not a yardstick of definite value; it has been said to be 'merely an embodiment of the English sporting idea of fair play.' "

And in the case of *Vernon* v. *State,* 18 S. (2d) 388, 389, the court stated:

> "Procedural due process, broadly speaking, contemplates the rudimentary requirements of fair play."

Also, in the case of *United States* v. *Ragen,* 86 F. Sup. 382, p. 388, 389, the court noted the fact that due process of law in the Fifth Amendment and the Fourteenth Amendment meant the same, except that one applied to the federal government and the second to the state governments. After making this observation, the court stated (p. 389):

> "Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this court an exercise of judgment upon the whole course of the proceedings, in order to ascertain whether they offend those canon of decency and fairness which express the notions of justice of English-speaking peoples toward those charged with the most heinous offenses.
>
> * * * * * * *
>
> "In *Lisenba* v. *California,* 314 U. S. 219, 236, the court defined denial of due process as 'the failure to observe that fundamental fairness essential to the very concept of justice.' "

This court has likewise held in *Federal Communications Commission* v. *WJR,* 337 U. S. 265, 275:

> "* * * due process of law has never been a term of fixed and invariable content. This is true with reference to oral argument as with respect to other elements of procedural due process, for this court has held in some situations that such argument is essential to a fair hearing. *Londoner* v. *Denver,* 210 U. S. 373."

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Reasons for Granting Writ.

Since the denial of a writ of certiorari imports no expression of opinion upon the merits of the case (*United States* v. *Carver,* 260 U. S. 482), the denial of the petition for certiorari in this case means that the opinion of the Court of Appeals for the Eighth Circuit is to be permitted to stand although palpably in conflict with opinions of this Court, with another opinion of the same Circuit and with two opinions of the Second Circuit, and an opinion of the Circuit for the District of Columbia.

This Court held in *Keifer & Keifer* v. *Reconstruction Finance Corporation et al.,* 306 U. S. 381, and *Reconstruction Finance Corporation* v. *Menihan Corporation,* 312 U. S. 81, that the Reconstruction Finance Corporation may sue and be sued and that its status before a court of justice is the same as any ordinary litigant.

In the instant case, the Court of Appeals for the Eighth Circuit refused to follow that doctrine although in a subsequent case, *Reconstruction Finance Corporation* v. *Childress,* 186 F. (2d) 698, that same court reversed its position and followed the doctrine of the Keifer case. However, insofar as your Petitioner is concerned the damage wrought by the opinion of the Court of Appeals in this case can only be remedied by this Court.

The denial of this Petition for Certiorari also leaves undetermined a very important point of appellate procedure, important not only in the case at bar but to the many government chartered corporations. In the Keifer case decided in February, 1939, it was said:

> "Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to sue and be sued was included."

Undoubtedly, there are many more of such corporations now in existence. Judicial guidance in this matter for so many important corporations is sufficient in itself to warrant certiorari in this case.

It is our position in this connection that the Reconstruction Finance Corporation, having failed to file its notice of appeal within 30 days from the rendition of judgment by the District Court, as required by Rule 73a of the Federal Rules of Civil Procedure, the Circuit Court of Appeals was without jurisdiction to pass upon the appeal.

If, as stated in the Keifer and Menihan cases, the Reconstruction Finance Corporation is to be regarded as any ordinary private litigant, with respect to the incidents of litigation, then certainly the decision of the Court of Appeals in the case at bar should not be permitted to stand to the irrevocable prejudice of your Petitioner. Since the time for taking an appeal is mandatory and jurisdictional, the Circuit Court of Appeals was without jurisdiction to make its order in the case at bar if the appeal by the Reconstruction Finance Corporation was not timely taken. Consequently, the denial of the Petition for Certiorari in this case means that the decision of the Court of Appeals assuming unto itself jurisdiction by its action in overruling Petitioner's motion to dismiss the appeal remains the law of the land on this point.

It seems to us that a point of law as here presented governing the jurisdictional time for taking an appeal which is of such importance to the people generally, should receive the consideration of the highest court of the land, particularly since it is a matter of first impression which has never been passed upon to our knowledge except in the opinion of the Court of Appeals in this case.

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The decision of this Court denying certiorari means to the bench, the bar and the public that the following matters are left undetermined and undecided:

1. The all-important point as to the conflict within the Circuits respecting the proper interpretation of the "sue and be sued" clause contained in the corporate charter of the Reconstruction Finance Corporation.

2. The equally important question, which now reaches this Court as a matter of first impression, as to whether or not the Reconstruction Finance Corporation shall be treated as an ordinary litigant with respect to the ordinary incidents of litigation (as was held by this Court in the Keifer and Menihan cases, *supra*) and therefore restricted to thirty days in which to file notice of appeal under Section 73a of the Rules of Federal Procedure.

3. The question of vital interpretation as to the legal efficacy of a duly congressionally authorized presidential directive. The Eighth Circuit has held in this case that such directive was merely a statement of policy (following the argument of counsel for the Reconstruction Finance Corporation) and therefore not legally sufficient upon which to base a contract. The recent case of *Mitchell* v. *Flintkote Co.*, 2 Cir., 185 F. (2d) 1008, has expressly held to the contrary, declaring such an executive order, while a declaration of public policy, nevertheless governed in the construction of a contract.

The Executive Order of President Roosevelt in this case was no mere preachment, declaration of intention or exhortation to governmental authority as Roscoe Pound defined the French Declaration of the Rights of Man (Law in the Service State, American Bar Association Journal, December, 1950), but was an authoritative statement of the law of land which Respondent was legally bound to observe and carry out. However, this order (statute) was ignored and if the opinion of the Court of Appeals in this case is permitted to stand, then Respondent will have

been permitted to ignore the law of the land with impunity.

May we respectfully state, in addition, that the moral aspect here involved is equally important. The Honorable John C. Collet, as Stabilization Administrator, held this presidential directive to be a "commitment" to your Petitioner, which should be observed; the Honorable Harold A. Judson, as Assistant Solicitor General, held this presidential directive to be binding on all administrative agencies of the government; and the Honorable Albert L. Reeves, in his opinion on the merits of the case in the District Court, holding that your Petitioner was entitled to this judgment, said (R. 453):

> "The whole aspect of the case is one showing a contract between the Government and its corporate arms or entities with the plaintiff. The contract was recognized by the Government and fully carried out by the plaintiff. The Government (or its corporate arm) is in default because it has not made good its promise to save the plaintiff harmless from loss and to assure it a fair margin of profit. On the contrary, the Government has taken refuge behind its sovereign armor. It has resorted to technicalities of the law for the purpose of defeating a just claim. A technicality has been well defined as a microbe which has gotten into the law and gives justice the blind staggers. That is exactly the situation here. At a time when the Government was in dire distress, and when its hard problems justified it in making fair promises to its citizens, the plaintiff responded to its call for aid on account of the assurances above set out. Now that the war is over the Government should not attempt to seek sanctuary behind its sovereign armor until the wreckages of the war have been cleared away and the wounds of the war bound up.
>
> The plaintiff is entitled to judgment, and same will be given."

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Conclusion.

For the reasons set forth above and in the Petition for Certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari be issued to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds confined to intervening circumstances, to-wit: the kind and character of respondent's brief on certiorari, the very recent decision in *Mitchell* v. *Flintkote Co., supra,* and on substantial grounds available to Petitioner not previously presented.

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